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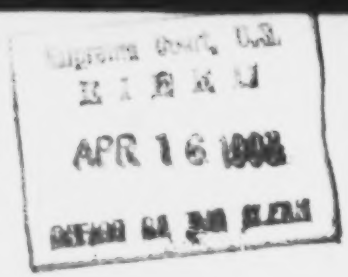

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

VIRGINIA CAROLINA TOOLS, INCORPORATED;
AMERICAN METAL INDUSTRIES, INCORPORATED,
d/b/a AMERICAN METAL INDUSTRY WHOLESALERS;
and THE ROI GROUP, INCORPORATED,
Petitioners,

vs.

INTERNATIONAL TOOL SUPPLY, INCORPORATED
and CURTIS PARK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 14, 1993

QUESTIONS PRESENTED

1. Whether, consistent with section 4 of the Federal Arbitration Act, a federal district court may refuse to order arbitration of a dispute over the duration of the parties' contractual duty to arbitrate, when the contract requires arbitration of "all disputes"?

2. Whether, under section 4 of the Federal Arbitration Act, a federal district court may look beyond an arbitration clause covering "all disputes" to consider contradictory evidence on the question of the contract's current validity, in ruling that a dispute over the duration of the contractual duty to arbitrate is not arbitrable?

3. Whether a procedural/substantive dichotomy in the interpretation of arbitration provisions of contracts is valid when, as a result, disputes over durational limits in the arbitration provisions are decided by the arbitrator, but disputes over the duration of the contract as a whole are decided by the federal district court?

PARTIES AND RULE 29.1 STATEMENT

Petitioners Virginia Carolina Tools, Inc. ("VCT") and American Metal Industries, Inc. ("AMI") are incorporated and headquartered in North Carolina. VCT is a wholly owned subsidiary of AMI, and AMI has no parent. Neither VCT nor AMI has any subsidiaries not wholly-owned or any affiliates that have issued shares to the public. Petitioner ROI Group, Inc. is incorporated and headquartered in New Jersey, and does not have any parent, subsidiary not wholly-owned, or any affiliate that has issued shares to the public.

Respondent International Tool Supply, Inc. is incorporated and has its principal place of business in Tennessee. Respondent Curtis Park is a resident and citizen of Tennessee.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

VIRGINIA CAROLINA TOOLS, INC.,
AMERICAN METAL INDUSTRIES, INC.,
and THE ROI GROUP, INC.,

Petitioners,

v.

INTERNATIONAL TOOL SUPPLY, INCORPORATED
and CURTIS PARK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Virginia Carolina Tools, Inc., American Metals Industries, Inc., and the ROI Group, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-titled proceeding on January 14, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 984 F.2d 113 (4th Cir. 1993), and is set out in the appendix to this petition ("App.") at pages A-1 through A-15. The opinion of the United States District Court for the Western District of North Carolina is reported as *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 793 F. Supp. 664 (W.D.N.C. 1992), and is set out in the appendix to this petition at pages A-16 through A-28.

JURISDICTION

On January 14, 1993 the United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court for the Western District of North Carolina in this matter (App. at A-15). No rehearing was sought before the court of appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have juris-

diction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specifically call a jury for that purpose. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing

the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT OF THE CASE

In the December 13, 1991 Option Agreement, petitioner Virginia Carolina Tools, Inc. ("VCT") contracted for an option to buy the assets and assume certain liabilities of respondent International Tool Supply, Inc. ("ITS") (App. at A-3; Appendix to the Fourth Circuit ("4th Cir. App.") at 54). By its terms, the option clause, which appears at the first full paragraph of page 4 of the Option Agreement, granted VCT a sixty-day exclusive option (4th Cir. App. at 57); thus, it was to expire February 11, 1992 (App. at A-4).

Affidavits filed in the district court by Petitioners show that during a February 1992 telephone call involving Curtis Park, president of ITS and several of Petitioners' executives, the Option Agreement was extended until the last day of March 1992 (Daspin Aff. ¶ 5, 4th Cir. App. at 77; Magac Aff. ¶ 5, 4th Cir. App. at 75). Park filed an affidavit denying he had agreed to an extension of the option period (Park Aff. ¶ 23, 4th Cir. App. at 99). However, Petitioners' affidavits showed that after February 11, Park acted inconsistently with expiration of the option by continuing to pursue closing of the sale (Ash Aff. ¶ 7, 4th Cir. App. at 82; Beiersdorf Aff. ¶ 11, 4th Cir. App. at 87-88; Second Daspin Aff. ¶ 3, 4th Cir. App. at 90-91).

On March 18, 1992, VCT was informed by ITS that it would not honor the option (4th Cir. App. at 62). On March 19 VCT exercised the option (4th Cir. App. at 60). ITS refused to perform.

The Option Agreement requires the parties to arbitrate "any dispute" that arises among VCT, AMI, ITS and Park:

> Should any dispute arise between the parties they agree to seek resolution through the American Arbitration Association (AAA) which the parties agree shall have exclusive jurisdiction and venue in Charlotte, North Carolina and North Carolina laws shall apply.

(App. at A-4; 4th Cir. App. at 58.) The arbitration clause has no time limit. It is distinct from the 60-day option clause. The arbitration clause appears on page 5 of the Option Agreement (4th Cir. App. at 58), and the 60-day option clause limitation appears on page 4 (4th Cir. App. at 57).

Petitioners sought arbitration of the parties' disputes before the AAA, including both the breach of contract claim and Respondents' objection that their duty to arbitrate had expired with the Option Agreement (4th Cir. App. at 63). The AAA agreed that its arbitrators could and should decide whether the Respondents could be compelled to arbitrate under the Option Agreement. ITS and Park refused to proceed (4th Cir. App. at 28).

On March 20, 1992, Petitioners initiated an action in the Superior Court of Mecklenburg County, North Carolina to compel arbitration (4th Cir. App. at 6). ITS and Park removed the case to the United States District Court for the Western District of North Carolina (4th Cir. App. at 21) and moved for an injunction prohibiting Petitioners from pursuing arbitration (App. at A-5, A-6). After a preliminary hearing, and relying on a portion of *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 850 F.2d 756 (D.C. Cir. 1988), the district court denied the motion to compel arbitration. The court ruled that whether the Option

Agreement, and consequently the arbitration clause, which it called the "Arbitration Agreement," had expired was a question for the court, not arbitration, because the Option Agreement contained an "unambiguous expiration date" (App. at A-22 - A-24).[1] The district court did not comment on the evidence that the Option Agreement had been extended; nor did it explain what it would do if, after trial, it found that the Option Agreement, and hence the "Arbitration Agreement," had been extended. The district court granted the motion to enjoin Petitioners from pursuing arbitration on condition of a $25,000 bond (App. at A-27 - A-28). On July 2, 1992, Petitioners filed a notice of appeal (4th Cir. App. at 30).

The Fourth Circuit affirmed the district court, dividing the review in two: first, whether the district court or the arbitrators should decide if "the duration dispute was arbitrable" (App. at A-7 - A-9); and second, whether the parties intended to arbitrate disputes over the "option agreement's very continuation" or, as restated by the court, its "duration" (App. at A-9 - A-10).

The Fourth Circuit held that the first issue was for the district court because (a) the federal presumption is against the arbitrability of the arbitrators' jurisdiction and (b) the arbitration clause in the Option Agreement, which committed "all disputes" between the parties to arbitration, was not specific enough on that issue to overcome that presumption against arbitration (App. at A-8 - A-9).

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[1] The district court also relied upon a follow-on case, *Liberty University v. Kemper Securities Group*, 758 F. Supp. 1148 (W.D. Va. 1991).

The Fourth Circuit relied upon *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) and on *National Railroad Passenger Corp.* to decide the second issue, which the circuit court reasoned should be approached as a question of contract interpretation: "'whether the parties, at the time they entered into the contract, intended that disputes over the duration of the contract would be decided by a court or the arbitrators'" (App. at A-9 - A-10 (quoting *National R.R. Passenger Corp.*, 850 F.2d at 760)). Without citation to a case or the record, the Fourth Circuit concluded that it is proper to presume that the parties had not contemplated arbitration of disputes over the Option Agreement's validity or termination:

> [I]t seems only slightly--if at all--less likely that parties would intend in the ordinary course to commit to arbitration disputes about the very existence (whether by origination or termination) of their contractual relationship than that they would intend to commit to arbitration the threshold question of the arbitrability of such disputes. While the general presumption in favor of arbitrability has not been expressly rejected in respect of the former as it has in respect of the latter, *see* Part II.A., we think it proper to accord it less force in respect of contract duration issues than is appropriate in respect of disputes arising under a contract whose own continuation is unchallenged.

(App. at A-10.)

The circuit court reinforced its decision to eviscerate the federal presumption favoring arbitration with the observation that the Option Agreement's "broad, non-specific arbitration clause is accompanied in the option agreement by an express

termination date provision," so "[t]here was no incipient issue of contract duration in the parties' memorialized agreement, hence no built-in likelihood of dispute over its duration" (App. at A-11). No elaboration of this reason was given.

REASONS FOR GRANTING THE WRIT

I.

This Court should resolve a split among the circuits as to whether a dispute over the termination or validity of a contract should be arbitrated when the contract requires the parties to arbitrate "all disputes."

A. The Second, Seventh, and Ninth Circuits have split with the Fourth, Third and Sixth on whether an arbitrator may decide disputes about the termination or validity of a contract.

In this case, the Fourth Circuit has joined the Third and Sixth Circuits against the Second, Seventh, and Ninth Circuits in holding that an arbitration clause governing "any dispute" between the parties does not cover disputes regarding the duty to arbitrate once a party asserts that the contract has terminated or is invalid. The Fourth Circuit held that the parties did not intend to arbitrate such issues because the arbitration clause did not specifically include such disputes.

The conflict among the circuits is stark. The Ninth Circuit held in *Camping Construction Co. v. District Council of Iron Workers*, 915 F.2d 1333, 1338-40 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1684, 114 L. Ed. 2d 79 (1991), that a broad arbitration clause, such as an agreement to arbitrate "'any differences that may arise regarding the

meaning and enforcement of this Agreement,' or any other broad arbitration clause, such as 'any dispute arising out of this Agreement . . .'" requires submission of contract termination disputes (and thus disputes over termination of the duty to arbitrate) to arbitration. The Ninth Circuit has consistently given a generous reading to these "customary" arbitration clauses. *See, e.g., McKinney v. Emery Air Freight Corp.*, 954 F.2d 590, 593 (9th Cir. 1992) (for disputes "over whether a contract has expired or has been terminated . . . the issue is for the arbitrator if the breadth of the arbitration clause is not in dispute"); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1294, 117 L. Ed. 2d 516 (1992) (validity of the contract as a whole is for the arbitrator); *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507, 511 n.4 (9th Cir. 1987) (when a collective bargaining contract contains a "customary" arbitration clause, dispute whether the contract was terminated or repudiated before the arbitration demand was made is for the arbitrator).

Like the Ninth, the Second and Seventh Circuits have held that contract termination or validity must be determined by the arbitrator when the arbitration clause is broad. In *Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80*, 605 F.2d 1290 (2d Cir. 1979), the City of Rochdale fought arbitration of a dispute over the contract's termination. The Second Circuit ruled that the question of contract termination (and thus termination of the duty to arbitrate) was for the arbitrator when the parties have "agreed to submit to arbitration disputes 'of any nature or character,' or simply 'any and all disputes'. . . ." *Id.* at 1295.

In *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 277 (7th Cir. 1992), the Seventh Circuit ruled unequivocally that

when the contract has a broad arbitration clause issues of validity of the contract are for the arbitrator alone. *See also Wilson Wear, Inc. v. United Merchants and Mfrs., Inc.*, 713 F.2d 324, 328 (7th Cir. 1983) (issue of mutual cancellation of entire contract is for the arbitrator).

The Sixth Circuit recently held that the court should decide issues of contract termination, even when the contract contains a broad arbitration clause indistinguishable from those before the Ninth, Second and Seventh Circuits. In *Roney and Co. v. Kassab*, 981 F.2d 894, 899 (6th Cir. 1992), the district court granted a motion to compel arbitration before the New York Stock Exchange. On appeal, the defendant argued that NYSE Rule 603, which rendered claimant ineligible for arbitration after six years, precluded any reference of the case to arbitration. NYSE Rule 603 was not included in the text of the contract, but, like all NYSE rules, was incorporated by reference. The contract had a broad arbitration clause providing that it would apply to "any controversy" between the parties. Although the district court held that the applicability of Rule 603 was for the arbitrator, the Sixth Circuit vacated this decision and remanded, requiring the district court to apply Rule 603. *Id.* at 899.

In *PaineWebber Inc. v. Hartmann*, 921 F.2d 507 (3rd Cir. 1990), the Third Circuit faced exactly the same issue as did the Sixth in *Roney*. There was no dispute that a valid arbitration agreement bound the parties -- Hartmann argued that it was for the arbitrator to decide if NYSE Rule 603 barred the claims and PaineWebber argued the rule was a "substantive limitation on the life of its obligation to arbitrate," so no arbitration could be compelled. The Third Circuit ruled that the issue was for the court and that arbitration could not be compelled. *Id.* at 512-14; *see also National Iranian Oil Co. v. Mapco Int'l, Inc.*, 983 F.2d 485, 491 (3d Cir. 1992) (9

U.S.C. § 4, by implication, "authorizes the district court to adjudicate any procedural issues, such as timeliness").

B. The circuits' split is explained by conflicts over the presumption favoring arbitrability of disputes and the duty to give contract language its plain meaning.

The differences between the Fourth, Third and Sixth Circuits on one hand and the Ninth, Second and Seventh Circuits on the other can be articulated in several ways, but stated most simply, the Ninth, Second and Seventh Circuits read the word "any" to mean just that. They credit the parties' chosen language with its plain meaning.

Also, the Ninth, Second and Seventh Circuits apply the foundational federal presumption favoring arbitration to questions of the arbitrability of the termination or validity of the contract. *See, e.g.*, *Rochdale Village*, 605 F.2d at 1295 (presumption favoring arbitrability "clearest when a party asserts that a particular type of claim falls outside the scope of an arbitration clause"); *Flender Corp.*, 953 F.2d at 277-78 (argument pretending "to be a challenge only to the validity of the arbitration clause" does not trump standard presumptions favoring arbitrability); *Standard Fruit Co.*, 937 F.2d at 478-79 (applying presumptions to dispute regarding whether contract even made).

In *Virginia Carolina Tools*, the Fourth Circuit's analysis focused with one question: "'whether the parties, at the time they entered into the contract, intended that disputes over the duration of the contract would be decided by a court or the arbitrators.'" (App. at A-9 (quoting *National R.R. Passenger Corp.*, 850 F.2d at 760)). The Court concluded that it is proper to presume that the parties had <u>not</u> contemplated

arbitration of disputes over the Option Agreement's validity or continuation:

> [I]t seems only slightly--if at all--less likely that parties would intend in the ordinary course to commit to arbitration disputes about the very existence (whether by origination or termination) of their contractual relationship than that they would intend to commit to arbitration the threshold question of the arbitrability of such disputes. While the general presumption in favor of arbitrability has not been expressly rejected in respect of the former as it has in respect of the latter, *see* Part II.A., we think it proper to accord it less force in respect of contract duration issues than is appropriate in respect of disputes arising under a contract whose own continuation is unchallenged.

(App. at A-10 - A-11.)

The Fourth Circuit could reach this point only by adopting an interpretation of the Option Agreement contrary to its plain language. The Option Agreement states that the parties will be bound to arbitrate "any dispute." Common understanding of the English language compels one to the conclusion that "any dispute" must include disputes over the validity of the very contract that is the subject of the arbitration clause. As a result, in the Fourth and Sixth Circuits "any" means something less; it means "almost any, but to include . . . ."

Moreover, the court eviscerated the federal presumption favoring arbitration of disputes over the validity or continuation of a contract without citation to authority or discussion of the conflict between its action and this Court's teaching that under the Federal Arbitration Act a federal court is not

free to abandon the presumption favoring arbitration merely because it is convenient or is the court's idea of good policy.[2] *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985) (arbitration required when parties have so agreed notwithstanding a court's "'own views of economy and efficiency'" (citation omitted)).

The D.C. Circuit has modified the presumption embodied in section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, but reached the same result as the Second, Ninth and Seventh Circuits, thereby putting it in yet a third camp. In *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 850 F.2d 756, 762 (D.C. Cir. 1988), the court held that, for "broad" arbitration clauses, "we will presume that disputes over the termination or expiration of the contract should be submitted to arbitration." At this point the Ninth, Second and Seventh Circuits would send the dispute to the arbitrator, but the D.C. Circuit held that a party can overcome the presumption with "a clear showing" that the parties intended for the underlying contract to expire. *Id.* at 763. What constitutes "a clear showing," and the relationship of that test to relief at preliminary stages such as summary judgment, for example, is left unexplained by the D.C. Circuit.

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[2] The Third and Sixth Circuits could have reached their results only by similarly treating the language of the contract and the federal presumption favoring arbitration, but they did so without the bluntness found the Fourth Circuit's opinion.

C. The Fourth, Third, Sixth and D.C. Circuits are wrong.

To work well, contract law must be simple and in conformity with the everyday understanding of our language. The ruling of the Fourth, Third and Sixth Circuits, as a statement of contract law, is neither. The business community, which has flocked to arbitration in part to avoid the traps for the unwary that lurk in our courthouses, should be able to rely on the plain meaning of words like "any" and "all" when they agree to arbitrate. It is far easier to add an "except" than to draft "any disputes, and in addition disputes over arbitrability, contract validity and contract termination. . . ."

The rulings of the Fourth, Third, Sixth and D.C. Circuits are also bad arbitration law, because they contravene the so often repeated policy of section 2 of the FAA—federal law favors arbitration. Moreover, at a time when the federal courts are sinking under their workload and business worldwide is searching for alternative methods to resolve disputes that avoid the expense and delays of litigation, the hostility of the Fourth, Third and Sixth Circuits toward arbitration of disputes over validity or termination of contracts is bad policy without redeeming virtue.

The Fourth Circuit's ruling is especially egregious. To reach its conclusion that the phrase "any dispute" does not include all disputes, the Fourth Circuit reversed the federal presumption on a whim. Although earlier in its opinion the court cites footnote 7 of this Court's *Warrior & Gulf* decision, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7, 80 S. Ct. 1347, 1353 n.7, 4 L. Ed. 2d 1409 (1960), that footnote cannot be read to take jurisdiction away from the arbitrator where the parties have unambiguously given it. Also, *Warrior & Gulf* may not be read to

apply to situations in which a court must reach the merits to determine arbitrability.

Finally, the approach adopted by the Fourth, Third, Sixth and D.C. Circuits impermissibly requires district courts to evaluate the merits of the underlying claims in arbitration disputes. This Court has made plain that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Technologies*, 475 U.S. at 650, 106 S. Ct. at 1419, 89 L. Ed. 2d at 656. Here, Petitioners' breach of contract claim succeeds or fails on the question of whether the contract between VCT and ITS had expired by March 18, 1992. By allowing a district court to answer this question in its preliminary determination of whether the duty to arbitrate survives an alleged termination of the contract, the Fourth, Third, Sixth and D.C. Circuits give insufficient weight to this Court's warning in *AT&T Technologies*.

II.

This Court should resolve the split among the circuits regarding what evidence a court may consider in deciding whether a dispute over the termination or validity of a contract is arbitrable.

A. There is a three-way conflict among circuits over the "Severability Doctrine" announced in *Prima Paint*, with the Fourth, Sixth, and Third Circuits in one camp, the Eighth and D.C. Circuits in another and the Ninth and Second Circuits in yet another.

This Court held in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404, 87 S. Ct. 1801, 1806,

18 L. Ed. 2d 1270, 1274 (1967), that section 4 of the FAA (9 U.S.C. § 4) permits a court to "consider only issues relating to the making and performance of the agreement to arbitrate." However, courts of appeals have split over the scope of judicial inquiry under section 4 when one party refuses to arbitrate alleging that the underlying contract has terminated or is invalid.

B. The Ninth, Second and Seventh Circuits have adopted the Severability Doctrine derived from *Prima Paint*.

The approach of the Second, Seventh and Ninth Circuits comports well with section 4 of the FAA as interpreted by *Prima Paint*. As soon as the court finds that (1) a broad arbitration agreement was made, and (2) one party has refused to arbitrate a contract issue, the case goes to the arbitrator to determine if the refusal is rightful. *Prima Paint Corp.*, 388 U.S. at 404, 87 S.Ct. at 1806.

The Ninth Circuit has reasoned that a corollary of the limited review permitted by section 4 is the so-called "Severability Doctrine": "*Prima Paint* demands that arbitration clauses be treated as severable from the documents in which they appear unless there is clear intent to the contrary." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d at 469, 476 (9th Cir. 1991), *cert denied*, ___ U.S. ___, 112 S.Ct. 1294, 117 L.Ed. 2d 516 (1992). The Severability Doctrine requires the district court to disregard the contractual language around the arbitration clause and look only to the arbitration clause for answers to arbitration questions absent extraordinary circumstances. *Id.*

In *Standard Fruit Co.*, the Ninth Circuit reversed the district court, which had looked beyond the arbitration clause

to make an initial determination that the document in which the clause was found was not intended to be a binding contract. The circuit panel ruled that the district court had violated section 4 of the FAA and failed to follow *Prima Paint* when it ruled that it must decide whether there was currently a valid contract between the parties. *Id.* at 476 n.9. Like the Ninth, the Second and Seventh Circuits have restricted judicial inquiry to the arbitration clause, even when the court faces contradictory evidence regarding the duration or validity of the contract. In *Flender Corp.*, 953 F.2d at 277, the Seventh Circuit interpreted *Prima Paint* to require the Severability Doctrine and thereby restricting judicial inquiry "solely [to] the arbitration clause [to] determine whether there is an agreement to arbitrate the underlying dispute."

The Second Circuit also follows this rule, especially in cases involving time-bar defenses to arbitration demands. The Second Circuit explained its reasoning in *Conticommodity Services Inc. v. Philipp & Lion*, 613 F.2d 1222 (2d Cir. 1980). The district court had denied a motion to compel a commodities exchange arbitration, ruling that the agreement was no longer "viable," because the arbitration demand was untimely under the arbitration clause. The Second Circuit reversed and ruled that:

> [A] court under section 4 [of the Federal Arbitration Act] is limited to determining whether a party refused to arbitrate, not whether it rightfully refused. A contrary conclusion, permitting the court to evaluate the 'rightfulness' of a party's refusal to arbitrate, would be at odds with the limited scope of judicial inquiry authorized by section 4."

Id. at 1227 (citation omitted). *See generally In re Arbitration No. AAA13-161-0511-85 (Government of India v. Cargill*

Inc.), 867 F.2d 130, 133 (2d Cir. 1989) (the "agreement to arbitrate was sufficiently broad to encompass the question of the time bar").

C. The Fourth, Sixth and Third Circuits have rejected the Severability Doctrine in favor of a wide-ranging preliminary search for evidence of a contract's validity or termination.

The Fourth Circuit, like the Third and Sixth Circuits, has approved a level of review that goes far beyond the quick look permitted under section 4 of the FAA and the Severability Doctrine. In this case the Fourth Circuit approved the district court's travels far beyond the Option Agreement's broad arbitration clause. The district court reviewed the entire contract and relied upon the option clause, which said nothing about arbitration.

In *Roney & Co. v. Kassab*, 981 F.2d 894 (6th Cir. 1992) and *PaineWebber Inc. v. Hartmann*, 921 F.2d 507 (3d Cir. 1990) the parties' contracts had broad arbitration clauses, but in a separate clause incorporated by reference the rules of the New York Stock Exchange. NYSE rule 603 imposes a six year statute of repose on arbitration demands. Had the two courts followed the Second and Ninth Circuits, they would have looked only to the broad arbitration clause and referred questions regarding the effect of Rule 603 to arbitration; instead, both courts ruled on the issue of whether the arbitration demand was untimely under NYSE Rule 603. Both refused to allow arbitration of the underlying claim.

D. The Eighth and D.C. Circuits have straddled the fence on the Severability Doctrine by looking beyond a contract's arbitration provisions, but looking only for "clear" evidence of the parties' intent.

The Eighth Circuit, too, has ruled that "in determining whether a duty to arbitrate exists, the court must examine both the arbitration clause itself and the other terms of the contract bearing on arbitration, whether or not the other provisions expressly address arbitration. *Actors' Equity Ass'n v. American Dinner Theatre Inst.*, 802 F. 2d 1038, 1044 (8th Cir. 1986). However, the Eighth Circuit is in conflict with the Fourth Circuit's ruling here, because it recognized that the presumption favoring arbitration is negated only if "other provisions of the contract . . . clearly and unambiguously negate or limit the application of the arbitration clause." *Id.* at 1044. The Fourth Circuit employs no such presumption.

Like the Eighth Circuit, the D.C. Circuit looked beyond the arbitration provisions in *National Railroad Passenger Corp.*, 850 F.2d at 762-63, but raised the evidentiary standard required to defeat reference of contract termination questions to the arbitrator:

> [E]ven in cases involving very broad arbitration clauses, the presumption in favor of arbitrating disputes over contract duration can be overcome by a clear showing that the parties intended for the underlying contract to expire . . . before the relevant dispute arose.

Id. at 762-63. However, both the Eighth and D.C. Circuits failed to consider explain what is "clear" evidence that the underlying contract expired or terminated.

Petitioners assert that the Ninth, Seventh and Second Circuits are correct. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75, 109 S. Ct. 1248, 1253, 103 L. Ed. 2d 488 (1989) (the FAA "was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate'" (citation omitted)). However, this Court has not addressed whether a court should look beyond a broad arbitration clause when the terms of the underlying contract are subject to dispute by the parties, i.e., whether the *Prima Paint* decision should be applied to issues other than fraudulent inducement.

III.

This Court should issue the writ to rectify the confusion among the circuit courts regarding "procedural" versus "substantive" prerequisites to arbitration when the dispute is over a contract's validity or termination.

Respondents argued below that Petitioners' arbitration demand came too late because the Option Agreement expired on February 11, 1992 and with it expired all obligations to arbitrate any dispute. The current dispute did not arise until March 18, 1992, when ITS stated that it would not honor VCT's exercise of the option. The Fourth Circuit ruled that the issue of whether VCT's demand for arbitration came too late was for the court because arbitration is a function of contract and no one can be compelled to arbitrate a dispute unless he has contracted to do so. Authority for this axiomatic statement of federal arbitration law is *AT&T Technologies*.

What the Fourth Circuit failed to do was articulate a principled distinction explaining the different results in this case and the results in *County of Durham v. Richards &*

Associates Inc., 742 F.2d 811 (4th Cir. 1984) and *In re Mercury Constr. Corp.*, 656 F.2d 933 (4th Cir. 1981 (en banc), *aff'd sub nom.*, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). In *Richards & Associates* the county refused to arbitrate a construction dispute because the arbitration clause in its contract was limited to "timely claims." The contract defined "timely claims" as those that, if raised in court, would not be barred by the applicable statute of limitations. The applicable statute of limitations was two years, but the arbitration demand came four years after work was completed on the project. The county argued that, since it had contracted to arbitrate only "timely claims", and the court was required to determine whether the parties had "agreed to settle their disputes through arbitration," the court should bar the arbitration as untimely. *Richards & Associates*, 742 F.2d at 815. The Fourth Circuit ruled that questions of timeliness are for the arbitrator. *Id.* The Second and Eleventh Circuits agree. *See Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1028 (11th Cir. 1982) ("procedural questions such as the timeliness of a request for arbitration under the arbitration agreement are to be resolved by the arbitrator unless the contract expressly provides for resolution by the district court"); and *Conticommodity Servs. Inc., v. Philipp & Lion*, 613 F.2d 1222, 1225 (2d Cir. 1980) (court should not rule upon "procedural defenses, such as untimeliness").

In *Moses H. Cone Memorial Hospital*, 460 U.S. at 29, 103 S.Ct. at 944, this Court affirmed a decision by the Fourth Circuit compelling a district court to "enter a § 4 order [compelling the parties] to arbitrate." In arriving at this holding, this Court concluded the circuit court correctly ordered the district court to compel arbitration even though the party resisting arbitration claimed that the arbitration demand was "barred by the statute of limitations" found in

the contract. *Id.* at 7, 103 S.Ct. at 932. This Court thus affirmed the circuit court's decision that the issue of timeliness was for the arbitrator, not the court.

Petitioners assert that if *Richards & Associates* and *Moses H. Cone Memorial Hospital* were rightly decided, there are no jurisprudentially correct grounds to distinguish those cases from this one. The Fourth Circuit rejected this argument by calling *Richards & Associates* a decision on "procedural objections to the enforceability of particular obligations to arbitrate" (App. at A-11).

The Third Circuit, in *PaineWebber Inc. v. Hartmann*, 921 F.2d 507 (3d Cir. 1990), referred to the same "substantive/procedural" phraseology in ruling that the court, not the arbitrator, should rule on the question of whether NYSE Rule 603 was a bar to arbitration, even though the arbitration clause itself encompassed "any controversy." The court noted that there was "abundant precedent holding that time bar clauses in arbitration agreements are essentially procedural in nature and thus should not be interpreted by courts as substantive bars to arbitration." *Id.* at 512. Under this view a time bar clause that specifically references arbitration is "procedural" and for the arbitrator, while a clause indicating that the entire contract has expired on a certain date is "substantive" and for the court.

More recently, the Third Circuit confused this issue in *National Iranian Oil Co. v. Mapco International, Inc.*, 983 F.2d 485 (3d Cir. 1992). The dispute there was whether a petition to compel arbitration under section 4 of the FAA was barred by a statute of limitations not incorporated into the contract between the parties. Although recognizing that "[t]he Arbitration Act authorizes a district court to adjudicate the substantive issues of making and performance of an

arbitration agreement," the court took the remarkable step of holding that, "[b]y implication, the statute authorizes the district court to adjudicate any procedural issue such as timeliness under a statute of limitations, which pertain to the substantive issues within its jurisdiction." *Id.* at 491. The Third Circuit cited no authority to support the implied authority it found under the FAA, but held that "the district court must adjudicate the statute of limitations defense." *Id.* at 492.

However, the result before the Ninth Circuit would likely be exactly opposite. The Ninth Circuit, following this Court's guidance in *Prima Paint*, severs arbitration provisions from the rest of the contract and looks only to the arbitration provisions in deciding whether there is an agreement to arbitrate. Questions over termination of the contract as a whole are thus for the arbitrator; and a "procedural" time bar in an arbitration clause, such as the one referenced in *Richards & Associates*, might well be within the purview of the district court, since it deals expressly with arbitration. Thus, under the Ninth Circuit's heuristic, the logical result is exactly the opposite from the Fourth Circuit's here--"procedural limitations" found in an arbitration clause would be interpreted by the court, but "substantive limitations" on the contract as a whole would be within the purview of the arbitrator.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L. Ed. 2d 898 (1964), this Court discussed "procedural" and "substantive" prerequisites to arbitration in the labor context. Although the Court indicated that the labels are ofttimes meaningless, the Court did itself draw the distinction between procedural and substantive issues. Petitioners submit that, at least in the commercial arbitration context, the cases indicate considerable confusion on the part

of the circuit courts about the proper distinction between "procedural" and "substantive" prerequisites to arbitration and the holdings of this Court. The very confusion makes the situation difficult to characterize as a "conflict" among the circuits, but it is certainly a question ripe for guidance from *this Court.*

CONCLUSION

For these foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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April 14, 1993

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

VIRGINIA CAROLINA TOOLS, INCORPORATED; AMERICAN METAL INDUSTRIES, INCORPORATED, d/b/a AMERICAN METAL INDUSTRY WHOLESALERS; THE ROI GROUP, INCORPORATED,	)	
Plaintiffs-Appellants,	)	No. 92-1772
v.	)	
INTERNATIONAL TOOL SUPPLY, INCORPORATED; CURTIS PARK,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert D. Potter, District Judge.
(CA-92-102-P)

Argued: September 29, 1992

Decided: January 14, 1993

Before PHILLIPS, NIEMEYER, and LUTTIG,
Circuit Judges.

Affirmed and remanded by published opinion. Judge Phillips wrote the opinion, in which Judge Niemeyer and Judge Luttig joined.

COUNSEL

ARGUED: James Patrick McLoughlin, Jr., MOORE & VAN ALLEN, Charlotte, North Carolina, for Appellants. Alice Carmichael Richey, KENNEDY, COVINGTON, LOBDELL & HICKMAN, Charlotte, North Carolina, for Appellees. **ON BRIEF:** Joseph H. Nanney, Jr., Bradley E. Pearce, MOORE & VAN ALLEN, Charlotte, North Carolina, for Appellants. Clifford R. Jarrett, KENNEDY, COVINGTON, LOBDELL & HICKMAN, Charlotte, North Carolina, for Appellees.

OPINION

PHILLIPS, Circuit Judge:

This appeal presents the question whether a dispute over the duration of a written option agreement having a broad arbitration clause and a facially unambiguous termination date is for the court or the arbitrator. When the party seeking to exercise the option sought a preliminary injunction to compel arbitration of the dispute and for interim relief pending resolution of the dispute, the district court denied the motion and instead granted the opposing party's motion to enjoin arbitration pending judicial resolution of the dispute. We hold that the district court correctly decided that the

duration issue was for it, not the arbitrator, and that it did not abuse its discretion in denying the motion for interim injunctive relief. Accordingly, we affirm its various interlocutory orders and remand for further proceedings.

I

Appellants Virginia Carolina Tools, Inc. (VCT), American Metal Industries, Inc. (AMI), and the ROI Group, Inc. (ROI) contracted with appellees International Tool Supply, Inc. (ITS) and Curtis Park, its president, for a sixty-day exclusive option to purchase ITS's assets and assume certain of its liabilities.[1] The agreement consists of five pages and one attached schedule, beginning "[VCT]. . . . is pleased to make the following offer . . . on the following terms and conditions." Joint Appendix at 54. After three pages describing VCT's view of the current state of affairs and the desirable future, the agreement states

> Buyer [VCT] agrees, in consideration for Seller [ITS] and Shareholder [Park] providing this option, to expend, on a best efforts basis, such time, effort and expense as is required to consummate the transaction. In return, Seller and Shareholder agree to provide the Buyer with the exclusive right for 60 days (option period) from the date of execution of this agreement or before at Buyer's

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[1]VCT and AMI are North Carolina corporations with principal places of business there; ROI is comparably situated in New Jersey, ITS is a Tennessee corporation with its principal place of business there, and Park is a resident and citizen of that state. For simplicity's sake, the opinion will refer to appellants and appellees as the singular entities VCT and ITS, respectively, except where individual identities are relevant.

> option, by Buyer's providing ten days written notice of exercise of option to Seller[,] to consummate the transaction under the terms contained herein.

J.A. at 57. It then adds additional terms and conditions, including subsidiary promises, and contemplates VCT's attorney drawing an asset purchase agreement consistent with the option for ITS's approval. The text concludes with this broad arbitration agreement:

> Closing shall be anytime Buyer provides notice within the option period . . . . Should any dispute arise between the parties they agree to seek resolution through the American Arbitration Association (AAA) which the parties agree shall have exclusive jurisdiction and venue in Charlotte, North Carolina and North Carolina laws shall apply. The arbitration will provide for both legal and equitable relief.

J.A. at 58.

As the quoted language reveals, the exclusive option provision of the contract expired by its terms on February 11, 1992, sixty days after execution of the option by the parties on December 13, 1991. The parties later disputed, however, whether the entire contract (and, specifically, its arbitration clause) expired or only the exclusivity clause. They also disputed whether the option agreement, including the exclusivity clause, was extended through the end of March in a February conference call involving E. Michael Daspin, chairman of ROI and a director of AMI, John Magac, vice-president of VCT, and Park. Park denied any extension. VCT countered by citing behavior of ITS and Park allegedly consistent with an extension of the exclusive option period.

Whatever the truth of the matter, delays unquestionably developed, and the parties unquestionably continued to negotiate after February 11. VCT now claims that the delays resulted from ITS's tardy provision of financial information to VCT; ITS, that they resulted from VCT's difficulty in securing financing. During the delays, financially troubled ITS borrowed money to stay afloat.

On March 1, 1992, ITS received closing documents from VCT, none of which contained a closing date. Following discussions with his attorney and accountant, Park decided that ITS would cease negotiating with VCT. On March 18, he informed VCT that ITS was breaking off negotiations and that it would not honor the option agreement, which ITS claimed had expired on February 11. On March 19, 1992, VCT sought to exercise the option. ITS predictably refused to tender, and VCT requested arbitration on the issues of contract duration and breach of the agreement.

When ITS refused to submit to arbitration on the grounds that its obligation to do so had expired, VCT petitioned the Mecklenburg County Superior Court to compel arbitration pursuant to 9 U.S.C. § 2 and N.C. Gen. Stat. § 1-567.3. That court granted a temporary restraining order pending its resolution of the arbitration motion which barred ITS from selling its assets outside the regular course of business and forbade any disclosure of trade secrets. *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, No. 92-CVS-4346 (N.C. Super. Ct. Mar. 20, 1992) (show cause order and TRO).

Before a preliminary injunction hearing could be held, ITS removed the case to the United States District Court for the Western District of North Carolina pursuant to 28 U.S.C. §§ 1441 *et seq.*, asserting diversity jurisdiction under 28

U.S.C. § 1332. In that forum ITS answered VCT's motion to compel arbitration and for injunction, and sought injunctions against arbitration and the revelation of trade secrets. Following a June 19 hearing, the district court denied VCT's motion to compel immediate arbitration of the option duration question and for a preliminary injunction continuing the state court's TRO, granted ITS's motion to enjoin arbitration, and enjoined both parties from disclosing the other's trade secrets pending resolution of the case. *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 793 F.Supp. 664, 667, 669-70 (W.D.N.C. 1992). In doing so, the district court first determined that the threshold question of arbitrability was for the court, not the arbitrator. *Id.* at 667. It then held that the dispute over the duration of the option agreement was not arbitrable, *id.* at 668, reserving judgment on the substantive question whether there had been a parol extension of the written option agreement. *Id.* at 669.

This appeal by VCT followed.

II

We first consider the district court's denial of VCT's motion to compel immediate arbitration and its grant instead of an injunction barring VCT from pursuing arbitration pending resolution of the disputed substantive issue in the district court.

While decisions pertaining to injunctive relief normally are reviewed solely for abuse of discretion in applying the injunction standard, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975), we review such a decision *de novo* where it "rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986).

That is the situation here, for the district court's decision to grant ITS's motion to enjoin arbitration (and to deny VCT's motion to compel it) rested solely on two legal premises, successively applied: first, that as a mater of law the court, not the arbitrator, should decide the threshold issue of the duration dispute's arbitrability; second, that as a matter of law that substantive dispute was not arbitrable, but should be decided by the court.[2] We therefore review *de novo* the correctness of these two legal determinations upon which the district court's orders refusing to compel arbitration, but instead enjoining it, were rested.[3]

A

We first review the district court's legal conclusion that the threshold issue of the arbitrability of the dispute over the option's duration was for it, not the arbitrator.

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[2]Because the court's decision to enjoin arbitration was thus based solely on these legal conclusions, its failure to make the explicit findings normally required in ruling on requests for preliminary injunctive relief was not error.

[3]Though their opposing arguments are confusing on the point, it may be that both parties have failed consistently to appreciate that the decision under review involved the resolution of two successive arbitrability issues--not a single all-encompassing one. Thus, each seems at times to define the sole issue before the district court as whether the court or the arbitrator should decide the threshold question of the duration dispute's arbitrability, and at others to define it as whether the court or arbitrator should decide the substantive duration dispute. As indicated in text of this opinion, these are two different issues which need not be resolved the same way.

The general rule is that whether particular disputes are arbitrable under a contractual arbitration clause are questions for the court to decide as a matter of contract interpretation. But parties may of course provide by contract for arbitration even of arbitrability issues. *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986). An intention to do so, however, is sufficiently at odds with normal practice that the general policy-based, federal presumption in favor of arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960), is not applied as a rule of contract interpretation to resolve questions of the arbitrability of arbitrability issues themselves. Instead, a "clear and unmistakable" indication of the parties' intent to take this unusual course is required. In effect, the presumption with respect to this issue runs the other way: that except as clearly and unmistakably indicated in their contract, the parties did not intend to commit the very issue of the scope of arbitrability itself to arbitration. *AT&T Technologies*, 475 U.S. at 649; *United Steelworkers*, 363 U.S. at 583 n.7.

We need not decide if anything short of a specific, express provision, such as "all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration," would meet this test. It suffices to say that the typical, broad arbitration clause in the option agreement at issue here--which contains nothing approaching such a provision--does not. As the Second Circuit said when confronted with this question in connection with a similarly broad clause in *Necchi S.p.A. v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 696 (2d Cir. 1965) *cert. denied*, 383 U.S. 909 (1966), "[t]he arbitration provision here is broad, but not that broad." It does not

"clearly and unmistakably" commit arbitrability issues to arbitration.

We therefore affirm the district court's conclusion that, as a matter of law, the question whether the duration dispute was arbitrable was for the court, not the arbitrator, to decide.

B

This leads to the second question: whether the district court, having correctly decided that it, not the arbitrator, should decide whether the duration dispute was arbitrable, then correctly decided that it was not arbitrable but should also be decided by the court.

The question whether a dispute over an agreement's duration is for court or arbitrator theoretically can be approached in two basic ways. It could be thought properly to turn on whether the agreement itself has expired. For if it has, the obligation to arbitrate *any* dispute arising under it has also expired, since the obligations' source if the agreement's arbitration clause. But to take this approach obviously requires deciding, or coming close to deciding, the very issue of the agreement's duration whose arbitrability is in issue. For good reason, this circular approach has been rejected as one that necessarily compromises decision on the very matter in dispute in the course of deciding who shall decide it. *AT&T Technologies*, 475 U.S. at 649.

The other approach--and the proper one--treats the question as one simply of contract interpretation. It asks directly "whether the parties, at the time they entered into the contract, intended that disputes over the duration of the contract would be decided by a court or the arbitrators." *National R.R. Passenger Corp. v. Boston & Maine Corp.*,

850 F.2d 756, 760 (D.C. Cir. 1988). This gets directly at the matter, simply applying the fundamental principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers*, 363 U.S. at 582. And it does so by a process that avoids the problems of circularity and compromise of the decisional process that make the first approach unacceptable.[4]

Taking this approach, as did the district court, we agree with that court that an intent to arbitrate disputes over the option agreement's very continuation cannot be inferred from the text of this agreement, including its broad arbitration clause.

VCT makes the obvious argument that the reference in that clause to "any dispute aris[ing] between the parties" must, particularly when given the arbitrability presumption's push, be understood to include disputes over contract duration. But we disagree, for two principal reasons.

In the first place, it seems only slightly--if at all--less likely that parties would intend in the ordinary course to commit to arbitration disputes about the very existence (whether by origination or termination) of their contractual relationship than that they would intend to commit to arbitration the threshold question of the arbitrability of such disputes. While the general presumption in favor of arbitrability has not been expressly rejected in respect of the former as it has in respect of the latter, *see* Part II.A., we

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[4]The conceptual difficulties posed by disputes over the arbitrability of contract duration issues are more extensively explored in *National R.R.*, 850 F.2d at 756, 757-60.

think it proper to accord it less force in respect of contract duration issues than is appropriate in respect of disputes arising under a contract whose own continuation is unchallenged.

In the second place, the broad, non-specific arbitration clause is accompanied in the option agreement by an express termination date provision. There was thus no incipient issue of contract duration in the parties' memorialized agreement, hence no built-in likelihood of dispute over its duration.

Taking into account the implications of a broad, non-specific arbitration clause in combination with an express termination date provision, and according proper weight to the general presumption in favor of arbitration when applied to a dispute over the very continuation of contractual obligations, we conclude that an intent to commit that issue to arbitration cannot properly be inferred from this agreement. *See National R.R.*, 850 F.2d at 763 ("[I]f a contract provides that 'all disputes between the parties shall be arbitrated,' but with equal clarity provides that it will expire on a date certain, then any dispute over whether the contract actually expired or was extended by the parties must be decided by the court rather than by the arbitrator.").

Contending for a contrary view, VCT advances related arguments that require consideration, though in the end we reject them. They rely on decision in which procedural objections to the enforceability of particular obligations to arbitrate were held to be arbitrable, *see County of Durham v. Richards & Assocs., Inc.*, 742 F.2d 811, 815 (4th Cir. 1984) (limitations); *In re Mercury Constr. Corp.*, 656 F.2d 933, 942 (4th Cir. 1981) (en banc), *aff'd sub nom., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (abstention), and on decision in which voidability defenses to an underlying contract were held to be arbitrable,

see Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Workers Union, 430 U.S. 243, *reh'g denied*, 430 U.S. 988 (1977); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

From these decisions, VCT argues that obligations to arbitrate, once made, must be considered perpetually in force independently of the continued existence of their contractual sources, subject only to specific objections or defenses to their enforceability which are themselves arbitrable. On this view, a dispute over the continued existence of the underlying contract is of a piece with procedural objections and voidability defenses, hence is also arbitrable under the principles applied in these cases.

We disagree. These decisions certainly stand for the propositions that obligations to arbitrate do not invariably terminate upon termination of the underlying contract's prime obligations, *Nolde Bros.* and *Prima Paint*, and that their enforcement may be subject to procedural objections which are themselves arbitrable, *Mercury Constr.* and *County of Durham*. But that is as far as they go for purposes of decision in this case. Critically, though they contemplate that obligations to arbitrate may exist independently of underlying prime contractual obligations and survive the latter's termination, they expressly recognize that whether they do survive in a particular case depends upon whether the law can impute such an intention to the parties. *Nolde Bros.*, 430 U.S. at 255; *Prima Paint*, 388 U.S. at 402 & n.9. As indicated, we do not believe that any intention to commit the duration dispute here in issue to arbitration can properly be imputed to these parties, whether or not they may have intended that the obligation to arbitrate, so far as it extended, should survive termination of the option agreement.

We affirm the district court's legal conclusion that, as a matter of contract interpretation, the dispute over the option's duration was for it, not the arbitrator, to decide.

III

We turn now to the district court's denial of VCT's request for interim injunctive relief barring ITS from selling its assets outside the normal course of business pending resolution of the duration dispute.[5] We review that ruling for abuse of discretion.

We can find no abuse here. The district court properly applied the hardship balancing standard announced in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), and reiterated in our more recent case, *Rum*

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[5]This particular interim injunctive relief was originally granted in the state court's TRO, and as there granted was only for the period "pending hearing on the . . . motion for preliminary injunction." J.A. at 20. Following removal of the case to the district court, VCT moved in that court for continuation of the relief "pending resolution of the arbitration between the parties." J.S. at 45. Having decided to enjoin the arbitration, the district court addressed the request as if it were for continuation of the state TRO relief "pending outcome of the dispute between the parties," and as such denied it. J.A. at 52.

We review the district court's denial according to that court's interpretation of the relief being sought.

Neither party challenges that portion of the district court's order enjoining both from disclosing the other's trade secrets. J.A. at 53.

Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991), to determine whether this injunction should issue. This standard requires the trial court to examine four factors: the likelihood of irreparable harm to the movant if the preliminary injunction is denied, the likelihood of harm to the potentially enjoined party if the requested relief is granted, the likelihood that the movant will succeed on the merits, and the public interest. *Id.* All four factors do not weigh equally, however; the first two dominate. If, in balancing irreparable harm to the movant on denial of the injunction and harm to the potentially enjoined party on granting of it, the balance decidedly favors the movant, an injunction will issue when "'the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.'" *Id.* (quoting *Blackwelder*, 550 F.2d at 195). AS the balance tips away from movant, a stronger showing on the merits is required. *Rum Creek*, 926 F.2d at 359.

Here the district judge determined that the harms VCT alleges it will suffer if ITS is sold--loss of distributor agreements, loss of sales, expenses incurred in relocation, injury to reputation, loss of profits, and loss of volume discounts--were not irreparable. His finding that these highly speculative and largely economic injuries did not constitute irreparable harm cannot be said to be clearly erroneous. Nor can his finding that ITS might be driven to insolvency by a preliminary injunction. Having determined that VCT would not suffer irreparable harm from a denial of the injunction, the district judge did not err in declining to consider either the likelihood of success on the merits or the public interest.

We therefore affirm the denial of this particular injunctive relief.

IV

In sum, we affirm the district court's decisions refusing to compel arbitration and instead enjoining arbitration of the dispute over the continued existence of the option agreement, and its denial of VCT's motion for injunctive relief pending resolution of the dispute. We therefore remand the case to the district court for further proceedings to resolve that dispute.

SO ORDERED

VIRGINIA CAROLINA TOOLS, INC., American Metals Industries, Inc., d/b/a American Metal Industry Wholesalers, and the Roi Group, Inc., Plaintiffs,

v.

INTERNATIONAL TOOL SUPPLY, INCORPORATED and Curtis Park, Defendants.

No. 3:92CV102-P.

United States District Court, W.D. North Carolina, Charlotte Division.

June 23, 1992.

James P. McLoughlin, Jr., Neil C. Cooksey, Bradley E. Pearce, Moore & Van Allen, Charlotte, N.C., For plaintiffs.

Clifford R. Jarrett, Alice Carmichael Richey, Charles V. Tompkins, Jr., Kennedy Covington Lobdell & Hickman, Charlotte, N.C., For defendants.

MEMORANDUM OF DECISION AND ORDER

ROBERT D. POTTER, District Judge.

THIS MATTER is before the Court on Plaintiff's complaint and motion to compel arbitration, filed in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, on March 20, 1992.

The action was removed to this Court pursuant to 28 U.S.C. § 1441(a) in that this Court has jurisdiction pursuant to 28 U.S.C. § 1332, this being an action between citizens of different states in which the amount in controversy, exclusive of costs and interests exceeds the sum of $50,000.00.

The matter came on to be heard before this Court on June 19, 1992, in Charlotte, North Carolina.

The following matters are before the Court now:

The Plaintiffs seek an Order:

1. Compelling the Defendants to arbitrate the dispute, pursuant to 9 U.S.C. § 4.

2. Pending arbitration between the parties prohibiting the Defendants from disclosing, conveying or making any use whatsoever of any trade secrets of VCI, AMI, or ROI, including Plaintiffs' business plan and other plans for ITS disclosed to Defendants in connection with the proposed acquisition by VCI to ITS.

3. Prohibiting ITS and/or Park from selling or entering into any agreement to sell any of ITS's stock or any of its

assets, other than sales of inventory in the ordinary course of its business, pending resolution of the arbitration between the parties to this action.

The Defendants seek and Order:

Enjoining Plaintiffs from arbitrating the dispute between the parties and from using or revealing confidential or proprietary information of Defendants currently in possession of the Plaintiffs.

BACKGROUND

On December 13, 1991 an option agreement in the form of a letter from the ROI Group, Inc. ("ROI") addressed to Mr. Curtis Park ("Park") of International Tool & Supply Co., Inc. ("ITS") was sent to Park at ITS. ROI was acting on behalf of Virginia Carolina Tools ("VCT"), a wholly owned subsidiary of American Metal Industries, a North Carolina corporation d/b/a American Metal Industry Wholesalers ("AMIW").

The letter offered to purchase selected assets and goodwill and assume certain selected liabilities of ITS ("Seller") subject to the warranties and representations of the common shareholders of ITS (Seller) on the terms and conditions set out in the letter.

On pages 4, 5, and 6 of the letter ("Option") appeared the following language pertinent to the matters before the Court:

Buyer agrees, in consideration for Seller and Shareholder providing this option, to expend, on a best efforts basis, such time effort and expenses as is required to consummate the transaction. In return, Seller and Shareholder

agree to provide the Buyer with the exclusive right for 60 days (option period) from the date of execution of this agreement or before at Buyer's option, by Buyer's providing ten days written notice of exercise of option to Seller to consummate the transaction under the terms contained herein.

. . .

Buyer's attorney will prepare an asset purchase agreement which will include such terms, conditions, covenants and warranties that would be customary and reasonable to Buyer and its financial institutions and investors in a transaction of this size and nature and which will be consistent with the terms contained herein. This agreement will also include such terms and conditions as are fair and reasonable to the Seller and Shareholder and consistent with the other terms of this agreement. Seller's attorney shall review the agreement. In the event that the parties cannot agree on the terms and conditions of a definitive contract reflecting those contained in this agreement, the parties agree to delay the closing and extend the term of this agreement until such time as the arbitrator, as discussed herein below, rules on those issues in dispute between the parties. The parties agree that any forms and/or conditions ruled on by the arbitrator will be hereby incorporated into this agreement and the definitive agreement as if same had been recited herein. If this agreement is not executed by Seller and received by Buyer within two weeks from the date hereof, it will be void and of no effect.

. . .

> Closing shall be anytime Buyer provides notice within the option period, at the office of Seller. Buyer shall provide ten days written notice of the date and time of closing. Seller represents it has all necessary consents, as well as that of its Board of Directors to enter into this transaction. Should any dispute arise between the parties they agree to seek resolution through the American Arbitration Association (AAA) which the parties agree shall have exclusive jurisdiction and venue in Charlotte, North Carolina and North Carolina laws shall apply. This arbitration will provide for both legal and equitable relief.

There is no dispute that:

1. the option agreement was signed by the Defendants on December 13, 1991, and contained a 60-day option period from the date of execution;

2. no letters of extension were exchanged between the parties; and,

3. the first documents for closing were sent by the Plaintiffs and received by the Defendants on March 1, 1992.

As the Court sees it, the controlling issue before the Court is whether or not there presently exists an agreement to arbitrate. The answer lies in whether the 60-day option agreement signed on December 13, 1991 was still in existence on March 1, 1992, when Park received the proposed closing documents.

However, the threshold question for the Court to decide is whether the existence of the option agreement and thus the arbitration agreement is for the Court or for the arbitrators.

ANALYSIS

The duty to arbitrate is contractual in origin. Whether or not there is a contract in existence requiring the parties to arbitrate is for the Court. AT&T Tech., Inc. v. Communications Workers, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

Both parties have filed affidavits. The Defendant Park's affidavit indicates that Park emphasized to the Plaintiffs that:

> . . . because ITS was losing money every month, it was very important to me that the sale close as soon as possible . . . [Park aff. ¶ 7].

On the other hand, the second affidavit of R. Gary Ash, President of Allied Tools Division of VCT, ¶ 7 states in part:

> However, Mr. Curtis Park, President and majority shareholder of ITS, represented to me and to other officers of VCT and AMI that the option to purchase ITS's assets was extended until the end of March, 1992 . . .

Gerald L. Beiersdorf, Chairman and Operations Managers of VCT in his affidavit, ¶ 6, stated:

> Based on the belief that Mr. Park intended to sell ITS's assets to VCT despite the fact that the Expiration Date had passed, VCT continued to sell merchandise to ITS at VCT's cost after February 11, 1992, the Expiration Date.

Michael Daspin, Chairman of ROI, and a director of AMI, filed an affidavit, ¶ 2 of which states:

> Under the terms of the December 13, 1991 Option Agreement between AMI, VCT, International Tool Supply, Incorporated ("ITS") and Mr. Park, VCT's option to acquire ITS expired on February 11, 1992. In early 1992, John S. Magac and I had a telephone conversation with Mr. Park about the closing of the transactions contemplated by the Option Agreement. At that time, our due diligence investigation of ITS was behind schedule, in part, because Mr. Park and ITS had failed to provide VCT and ROI with the information needed to complete the due diligence investigation. Mr. Park, for himself and ITS, agreed during our conversation to extend the option period until the last day of March, 1992.

Thus, there is apparently a dispute as to whether the option was extended so that the option and consequently the Arbitration Agreement still exists. That is a question for the Court.

Even though a contract provides as here that should any dispute arise between the parties they agree to such resolution through the American Arbitration Association, the cases seem to hold that when a contract provides that it will expire on a date certain, then any dispute over whether the contract actually expired or was extended by the parties must be decided by the Court, rather than by the arbitrator. Nat. R.R. Passenger Corp. v. Boston and Maine Corp., 850 F.2d 756 (D.C.Cir. 1988).

In the case before the Court there was an unambiguous expiration date. That rebuts any presumption in favor of

arbitration. Liberty Univ. v. Kemper Sec. Group, 758 F.Supp. 1148 (W.D.Va.1991).

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), cited by the Plaintiffs, has to do with whether a claim of fraudulent inducement of a contract containing a broad arbitration clause was for the arbitrators or the court. It had nothing to do with the termination or extension of a contract, but with the validity of the contract.

Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991), cert. denied __ U.S. __, 112 S.Ct. 1294, 117 L.Ed.2d 516 (1992), cited by Defendants, again concerned the validity of an arbitration agreement, not the question of whether the contract was still in existence.

County of Durham v. Richards and Assoc. Inc., 742 F.2d 811 (4th Cir. 1984) cited by Plaintiffs, concerned whether claims were timely filed under the contract which contained an arbitration clause that adopted the state-law statute of limitations as the time limit on making claims for arbitration. That is not the question before this Court. The question here is whether the option contract which included the arbitration provisions had expired after the termination date and thus terminating Defendants' duty to arbitrate.

In summary, the option contract, which included the arbitration clause, had a definite termination date, February 11, 1992. The question of whether it was extended, is for the Court not the arbitrators.

Therefore, the Court will grant Defendants' motion for preliminary injunction, enjoining Plaintiffs from arbitrating

the dispute concerning the duration of the option agreement which by its terms expired February 11, 1992.

Plaintiffs' Motion for Injunctive Relief Enjoining Defendants From Selling ITS's Stock or Assets.

The Plaintiffs seek a preliminary injunction prohibiting ITS and/or Park from selling or entering into any agreement to sell any of ITS's capital stock or any of ITS's assets, other than sales of inventory in the ordinary course of business, pending outcome of the arbitration between the parties.

The Plaintiffs seek the preliminary injunction for the following reasons:

The acquisition of ITS was an integral part of the overall business plan of AMI to establish a regional wholesale distribution network for machine tools throughout the Southeast United States and to go public with the combined enterprise within five years. ITS's location in Tennessee is essential to this plan. If Defendants are permitted to sell ITS, Plaintiffs [sic] injuries will include:

- The loss of distributor agreements which ITS agreed to transfer to VCT pursuant to the Option Agreement that cannot reasonably be obtained from any other source, including distributor agreements for product lines that VCT does not currently have.

- Loss of sales. For example, in late February 1992, Allied prepared a bid on behalf of ITS and VCT that would have resulted in $200,000 in annual sales.

- The continued expense of paying the salaries and benefits of two sales representatives in eastern Tennessee, who

were relocated in anticipation of consummating the transaction.

- Injury to VCT's reputation in the industry, including irreparable damage to Allied's relations with its vendors, and damage to VCT's ability to consummate future transactions.

- Loss of profits. Between January 24, 1992 and March 27, 1992, VCT sold in excess of $13,000 in merchandise to ITS at cost. These sales were made to keep ITS viable until the transaction could be completed.
- Loss of volume discounts from vendors.

Additionally, VCT's right to arbitrate will be meaningless if ITS is sold before the conclusion of the arbitration proceeding. Defendant Park has indicated that he has limited financial resources and that he would be unable to pay any damage award.

DISCUSSION

The traditional standard for granting a preliminary injunction requires the Plaintiff to show that in the absence of its issuance the Plaintiff will suffer irreparable injury and that it has a reasonable probability of prevailing on the merits. Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d. 648 (1977).

In considering the injuries which the Plaintiffs allege they will suffer if Defendants are permitted to sell ITS the Court does not believe that a loss of distributor agreements which ITS agreed to transfer to VCT pursuant to the option agreement, nor the loss of sales, nor the expense of paying salaries and benefits of the sales representatives related in eastern

Tennessee, nor the purported injury to VCT's reputation in the industry, nor the speculative loss of profits, nor the loss of volume discounts to vendors would constitute irreparable injury to Plaintiffs.

In Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991), the court said:

> The standard for preliminary injunctions is established in this Circuit by Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). Blackwelder clarified that a hardship balancing test applies to determine the granting or denial of a preliminary injunction. See L.J. By and Through Darr v. Massinga, 838 F.2d 118, (4th Cir. 1988), cert. denied, 488 U.S. 1018, 109 S.Ct. 816, 102 L.Ed.2d 805 (1989). Four factors must be considered:
>
> (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,
>
> (2) the likelihood of harm to the defendant if the requested relief is granted,
>
> (3) the likelihood that the plaintiff will succeed on the merits, and
>
> (4) the public interest.

Massinga, 838 F.2d at 120. The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. If, after balancing those two factors, the balance "tips decidedly" in favor of the plaintiff, see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1054 (4th Cir. 1985), a preliminary

injunction will be granted if "the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." Blackwelder, 550 F.2d at 195; see Todd by Todd v. Sorrell, 841 F.2d 87, 88 n.2 (4th Cir. 1988). As the balance tips away from the plaintiff, a stronger showing on the merits is required. See Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980).

As to the balance of harm test, if the Defendants were precluded by a preliminary injunction from disposing of their assets pending the resolution of this dispute by trial and then possibly in an arbitration proceeding, the Court could very well be condemning the Plaintiffs to insolvency. Therefore, the court believes the balance of harm test tips in favor of the Defendants. The Court sill deny the Plaintiffs' motion for a preliminary injunction preventing the Defendants from selling any of ITS's assets.

Injunctive Relief Restraining Plaintiffs and Defendants From Using or Disclosing Confidential or Proprietary Information Obtained From the Other.

The Court understands that both parties are willing to submit to such an injunction at this time.

NOW, THEREFORE, IT IS ORDERED:

1. Plaintiffs' Motion to Compel Arbitration is DENIED.

2. Defendants' Motion for a Preliminary Injunction Enjoining Plaintiffs from arbitrating this dispute if GRANTED. The Plaintiffs and the American Arbitration Association shall not pursue any arbitration proceeding until

such time as it has been determined by this Court whether the arbitration provisions in the option agreement between the parties dated December 13, 1991 are in effect.

3. The Defendants shall give security in the form of a bond in the amount of $25,000.00 with a corporate surety authorized to do business in the State of North Carolina. The said bond shall provide for the payment of such costs and damages as may be incurred or suffered by the Plaintiffs if they are found to have been wrongfully enjoined.

4. The Plaintiff's Motion for a Preliminary Injunction prohibiting ITS and/or Park from selling or entering into any agreement to sell any of ITS's stock or any of its assets, other than sales if inventory in the ordinary course of its business, pending outcome of the dispute between the parties, is DENIED.

5. Both the Plaintiffs and the Defendants are ENJOINED from disclosing, conveying, or making any use whatsoever of any trade secrets or confidential information obtained from the other, including but not limited to business plans or other plans for the operation of ITS pending the outcome of this dispute.